Supreme Court, U.S.
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In The

Supreme Court of the United States

DAVID BOSTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The Eleventh Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. DAVID BOSTON WAS DENIED A FAIR TRIAL BY THE TRIAL COURT'S PROHIBITION ON CLOSING ARGUMENT CONCERNING THE FACT THAT CO-CONSPIRATOR GLENDA BOSTON HAD NOT TESTIFIED AND BY THE TRIAL COURT'S INSTRUCTION TO THE JURY THAT SUCH ARGUMENT WAS TO BE DISREGARDED AS COMPLETELY IMPROPER.

II. DAVID BOSTON WAS DENIED A FAIR TRIAL BY THE TRIAL COURT'S *SUA SPONTE* AND ARBITRARY RESTRICTION ON THE PRESENTATION OF THE DEFENSE CASE, TELLING DEFENSE COUNSEL TO NOT CALL ANY FURTHER WITNESSES, AND IF HE DID SO, HIS CLOSING ARGUMENT, WHICH ALREADY HAD BEEN ARBITRARILY REDUCED BY ONE-THIRD, WOULD BE FURTHER REDUCED MINUTE PER MINUTE FOR EACH ADDITIONAL MINUTE A DEFENSE WITNESS WAS ON THE WITNESS STAND.

LIST OF PARTIES

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, **DAVID BOSTON**, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in *United States v. David Boston,* filed September 12, 2006. The decision of the Eleventh Circuit was unpublished, but a true and correct copy is included in Appendix A, *infra.*

OPINION BELOW

The decision of the Eleventh Circuit Court of Appeals (Appendix, *infra)* was unreported but can be found at 2006 WL 2597782.

JURISDICTION

This Petition seeks review of the judgment entered by the United States Court of Appeals for the Eleventh Circuit on September 12, 2006, in *United States v. David Boston.* The decision of the Eleventh Circuit was unpublished, but a true and correct copy is included in Appendix A, *infra.* The jurisdiction of this Court to review the judgment of the United States Court of Appeals for the Eleventh Circuit is invoked under Title 28, United States Code § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. The Sixth Amendment to the United States Constitution provides:

> Amendment VI. Jury trials for crimes, and procedural rights
>
> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF FACTS MATERIAL TO THE QUESTIONS PRESENTED[1]

David Boston ("Boston" or sometimes also referred to as the "Defendant" or "Petitioner") was charged in a three count superseding indictment alleging in count one that on or about September of 2001, continuing through on or about April 16th, 2003, at Jacksonville, in the Middle District of Florida and elsewhere, that Boston knowingly, willfully and intentionally combined, conspired, confederated and agreed with persons, both known and unknown to the grand jury, to produce, publish and otherwise make and to pass, utter and attempt to pass and utter false, fictitious instruments and documents purporting to be actual securities and financial instruments issued under the authority of an organization which operates in or the activities of which affect interstate commerce, in violation of Title 18, United States Code, § 371.

Count Two alleged that between the summer of 2002 and December of 2002, at Jacksonville and elsewhere in the Middle District of Florida, David Boston, with intent to defraud, did knowingly manufacture, publish, produce and otherwise make and cause to be produced, published and otherwise made false and fictitious instruments and documents, said items appearing representing and purporting to be actual securities issued by organizations whose activities affect interstate commerce, in violation of Title 18, United States Code, § 514.

Count Three alleged that on or about January 8th of 2003, at Nassau County, in the Middle District of Florida,

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[1] Bracketed references are to the record on appeal at the Eleventh Circuit Court of Appeals.

and elsewhere, that Mr. Boston, with intent to defraud, did knowingly pass, utter, publish and cause to be passed, uttered and presented a false and fictitious instrument and document, that is a cashier's check purportedly drawn on Wachovia Merchant Bank, said item appearing, representing and purporting to be an actual security issued by an organization whose activities affect interstate commerce, in violation of Title 18, United States Code, § 514. [R72]

David Boston's ex-wife, Glenda Boston, was charged in the same indictment as his conspirator [R72], but she entered into a plea agreement with the Government and pled guilty shortly prior to David Boston's trial. [R99]

David Boston proceeded to trial by jury on March 14, 2005 and the trial continued March 15, 16, 17, 18 and concluded on March 21, 2005, at which time the jury returned a not guilty verdict on counts two and three but a guilty verdict on the conspiracy count, count one. [R129, 131, 133, 134, 135, 136, 140] The verdict came only after the jury announced that it was hopelessly deadlocked and then received an *Allen* charge. [R173-11]

David Boston filed a motion for new trial [R151] and motion for post-judgment acquittal notwithstanding the verdict [R150], which raised the merits issues presented in this petition, both of which were denied. [R154]

Sentencing was conducted on November 22, 2005 and Boston was sentenced to 27 months imprisonment followed by 36 months supervised release. [R181] Boston filed a timely notice of appeal. [R178, 179, 184] Boston's conviction was affirmed on appeal by an unreported decision of the Eleventh Circuit, as to which certiorari is

being sought by this petition. Boston remains incarcerated by the Federal Bureau of Prisons.

EVIDENCE RELATING TO ISSUE I – DAVID BOSTON WAS DENIED A FAIR TRIAL BY THE TRIAL COURT'S PROHIBITION ON CLOSING ARGUMENT CONCERNING THE FACT THAT COCONSPIRATOR GLENDA BOSTON HAD NOT TESTIFIED AND BY THE TRIAL COURT'S INSTRUCTION TO THE JURY THAT SUCH ARGUMENT WAS TO BE DISREGARDED AS COMPLETELY IMPROPER

During David Boston's closing argument the district court interrupted *sua sponte* after counsel stated "Glenda Boston has never testified." The court asked the Government at sidebar if it wanted a mistrial, which it refused, but agreed with the Government request to admonish the jury to disregard the argument as "improper."

> [Counsel for David Boston] . . . Glenda Boston has never testified. Glenda Boston –
>
> MS. O'MALLEY: Objection, Your Honor.
>
> THE COURT: Come on up.
>
> (At the sidebar.)
>
> THE COURT: Do you want a mistrial?
>
> MS. O'MALLEY: No, Your Honor, not after all of this, but I'd like an admonition. That's not in evidence.
>
> THE COURT: Yes.
>
> MR. FALLGATTER: I didn't say she –
>
> THE COURT: You commented on a co-conspirator not being called by the government to testify in a

> case when you know damn well what has been going on with the co-conspirator.
>
> Now I'm going to admonish the jury that it's not in evidence; they're to totally disregard it and it's improper argument.
>
> MR. FALLGATTER: That she didn't testify?
>
> THE COURT: You said they didn't call her to testify.
>
> MR. FALLGATTER: I didn't say that.
>
> THE COURT: Go ahead. Get back out there.
>
> (In open court.)
>
> THE COURT: Ladies and gentlemen, just totally disregard as improper any comments made about whether or not Ms. Boston testified or didn't in this case.

[R172-84-85]

Later, counsel for Boston asked for a curative instruction, which the district court denied:

> MR. FALLGATTER: . . . There was one matter that I researched over the weekend, if the Court has a moment for me to ask its consideration about a matter, and since my memory is never as perfect, I've asked the court reporter to help me verify what occurred. Things happen so fast in the courtroom, sometimes you confuse what happens at the sidebar versus what happens in open court.
>
> The Court may recall we had the question during my closing argument of whether there was a point where I had made the comments and I was going through the conspiracy argument and was

going to segue into the multiple conspiracy issue, and I put Count One up on the screen to talk about what the conspiracy count alleged, and it says Glenda Boston and David Boston, and I was going to talk about the membership in the conspiracy, and at that point I made the comment that Glenda Boston had not testified. We went to sidebar. At sidebar you had indicated you thought the comment was improper, but what the jury was told was simply to disregard my comment.

And, of course, knowing the great respect I have for the Court, and I know the jury feels the same way, so anytime it appears that maybe I'm crossing the line, it causes me concern in terms of my credibility with the jury.

So we checked the transcript and what I did say was that she had not testified, and the Court had thought that I had said the government had failed to call her.

THE COURT: No. I know what you said. What you said was she hadn't testified. Well, why would you call a co-conspirator to testify in a case?

MR. FALLGATTER: Why would I?

THE COURT: Yes. You wouldn't. They would. And what I gathered that you were implying, or the jury could imply, is that there was something going on without the government calling Ms. Boston as a witness. And that's why I told them to disregard the comment that you had made.

MR. FALLGATTER: First of all, I never got that far. I just was –

THE COURT: You said she didn't testify.

MR. FALLGATTER: Yes.

THE COURT: Well –

MR. FALLGATTER: But I thought the Court's concern at sidebar – you had indicated to me you thought I had said the government hadn't called her.

THE COURT: No, no. I know what you said. There's a lot of ways to say that they didn't call a witness without coming out and saying they didn't call a witness.

MR. FALLGATTER: Of course, my goal was-to say it the right way, and I had a lot of years of research on that very issue, and so I went back over the weekend to verify my understanding of it. And if I might share with the Court, I found an old case in my file that had been there for years, because this issue, as I think I mentioned, to my eye had come up virtually in every case I had ever tried. As a government lawyer, I never had a case where the defense lawyer didn't comment about the so-called missing witness. I used to have a whole section in my closing argument in rebuttal where I'd be prepared to address the missing witness, you know, they have equal subpoena power and those kind of responses.

And in that vein I was always guided by the Eleventh Circuit law that typically addressed it in the context of whether or not the government's rebuttal was proper or improper, and the Eleventh Circuit law, of course, they're certainly entitled to rebut it. So I found an old case and updated the research, and it's *United States versus Alejandro*, the very last page, it's Eleventh Circuit, 1997, and my case was 1998, which of course is only four years before I left the U.S.

Attorney's Office, so it was still fairly current at the time.

But again, it came up in this case in the context of the challenge to the government's rebuttal, and on page 6, there's the heading at the bottom left Closing Argument, and over on the top right, it talked about the government could properly respond to the defense assertion of the failure of the government to call Wilson, and that that was the main theme of the defendant's closing argument, he emphasized it repeatedly in a highly aggressive fashion, which was his right, and they then talk about the government had the right to respond, and citing Schardar, which is a 1988 decision that I had in my file as being on point and precedential.

So having my understanding of what I thought that law was before my opening, before my closing argument was rendered, and as reinforced by my review of it over the weekend, I remain of the view that my comment was correct and that I should have been permitted to comment on the fact that she didn't testify, and indeed, would have been presumably permitted to have elaborated on why that was relevant to the government's lack of proof of a single conspiracy. I did not proceed with any such arguments at that time because of the Court's – I was most recalling the Court told me at sidebar that my argument was improper, and I know you didn't tell the jury that but –

THE COURT: Excuse me. How about looking at the beginning on page 2 of what you gave me where it says the facts, second paragraph and it's even in the first paragraph: "FBI Agent Wilson,

FBI Agent Wilson." It doesn't say co-conspirator, codefendant.

MR. FALLGATTER: But Judge, you took her plea. She has a plea agreement with the government. She never took the Fifth Amendment. She stood up in front of you and admitted to being –

THE COURT: I have no idea whether she would or she wouldn't take the Fifth, what she would say or what she wouldn't say. That's not the point.

MR. FALLGATTER: Well, I thought it was, Judge. I thought the Court –

THE COURT: This is a defendant in a case. You know the story just like I know the story of what went on. That's all I know. I took a plea in the case.

MR. FALLGATTER: But my point is I didn't come to you to talk about a witness that I knew was going to take the Fifth Amendment. I had no knowledge that she would. Indeed, she didn't because she has been before the Court answering questions in a Rule 11 colloquy about the conspiracy. The government elected not to call her.

What they have, the only witness, at least the key witness I think to them linking her to the conspiracy is her own brother. Admittedly some of the others talk about, well, I saw Glenda in there printing checks.

THE COURT: And he testified.

MR. FALLGATTER: I know, and of course, my goal is to convince the jury not to believe him and to believe, in fact, that she was somewhat

hoodwinked ~~by him or~~ perhaps helping him out during his need to do some undercover work.

THE COURT: That who was? Ms. Boston? Then maybe you should have called Ms. Boston.

MR. FALLGATTER: Maybe the government should have. That was the whole point of my argument.

THE COURT: That's the whole reason why you don't let people get up and start arguing about co-conspirators, codefendants, people who might or might not be incriminating themselves.

MR. FALLGATTER: Well, I'm unfamiliar with that permutation of what I thought was the standard rule on it.

May I have one moment, Your Honor?

THE COURT: Sure. Just for the record this case is found at 118 F.3d 1518 that Mr. Fallgatter was citing.

MR. FALLGATTER: Thank you, sir. In any event, I don't know if that gives the Court any further guidance on –

THE COURT: Same ruling that I made.

MR. FALLGATTER: And my request for a curative instruction will be denied I take it?

THE COURT: Yes.

MR. FALLGATTER: Thank you, sir.

[R173-2-8]

EVIDENCE RELATING TO ISSUE II - DAVID BOSTON WAS DENIED A FAIR TRIAL BY THE TRIAL COURT'S *SUA SPONTE* AND ARBITRARY RESTRICTION ON THE PRESENTATION OF THE DEFENSE CASE, TELLING DEFENSE COUNSEL TO NOT CALL ANY FURTHER WITNESSES, AND IF HE DID SO, HIS CLOSING ARGUMENT, WHICH ALREADY HAD BEEN ARBITRARILY REDUCED BY ONE-THIRD, WOULD BE FURTHER REDUCED MINUTE PER MINUTE FOR EACH ADDITIONAL MINUTE A DEFENSE WITNESS WAS ON THE WITNESS STAND

The district court opened the last day of the evidentiary portion of the trial on March 18, 2005 by stating that the court had heard rumors that the defense intended to call two additional witnesses, and if it did so, the defense closing argument would be reduced minute per minute by the time the new witnesses were on the witness stand:

> [THE COURT] Whether it's true or not true, the rumor going around the courthouse is that Mr. Fallgatter now intends to call two more witnesses. My ruling is he can call everybody he wants. Both of you have one hour to argue. For every minute that another witness that Mr. Fallgatter has on the stand, other than Detective Smith, comes off his final argument. So take all the time you want, but that's my ruling.
>
> MR. FALLGATTER: May I address that, Your Honor?
>
> THE COURT: You can address it to the court reporter because I doubt if I'm going to listen to you.

MR. FALLGATTER: Well, I regret that, and I've suggested to the Court before that it seems like I do things that anger the Court.

THE COURT: Well, you do things kind of weird.

MR. FALLGATTER: I don't, Your Honor. I left here yesterday, and I've never not dealt with this Court in good faith, and I left yesterday. I've only been working until three or four o'clock every night; I've worked all weekend. I leave here yesterday and I believe that I don't have a witness. I told you that. And lo and behold, last night around six o'clock at my office shows up Kendell Renee Brown. I've been trying to reach her forever. She is the codefendant in the Day-Day case.

THE COURT: You can put her on the stand and it's coming out of your argument.

MR. FALLGATTER: And I'm asking you not to do that to me because –

THE COURT: Well, I'm going to do that. That's the ruling. This case has been going on for how long, Mr. Fallgatter?

MR. FALLGATTER: Four days.

THE COURT: Four days? No. When did this case start and when did you start sending out the subpoenas?

MR. FALLGATTER: Monday.

THE COURT: Well, it should have been long before Monday.

MR. FALLGATTER: And it was long before Monday. I've been trying to reach her for two or three weeks.

THE COURT: It should have been months, not weeks.

MR. FALLGATTER: I don't know of any lawyer that does months at a time.

THE COURT: Well, maybe next time when you have a case before me, you'll start preparing it. Months. That's my ruling. You run out of witnesses, you run out of case. I made an exception for this law enforcement officer because I don't want to be in the middle of a hullabaloo about who told who to say what and to come or not come, period. That's over with.

Now if you want to bring her in, bring her in, but it's coming off your argument. You want to bring another person in, bring them in, and it's coming off your argument.

MR. FALLGATTER: Judge, you originally said that I could have an hour and a half yesterday.

THE COURT: I lowered it to an hour yesterday because of what happened with your witness. My rule is you run out of witnesses, you run out of case. You got two strikes. Now you want a third one? Keep going.

The first strike was when it ended on Wednesday with no witness being here, and then it ended Thursday with no witness being here. There's no reason Wednesday why those Reverends couldn't have been waiting outside to testify Wednesday afternoon.

MR. FALLGATTER: We had witnesses here Wednesday, Your Honor. You misrecall. We were prepared to go. We decided to take a break and spend that time meeting with the government. Remember?

THE COURT: No, no.

MR. FALLGATTER: Yes, sir. Here's what we did. We decided to meet with the government and try to figure out how we could streamline our proof. We had witnesses waiting out there.

THE COURT: That's the ruling.

MR. FALLGATTER: But Judge –

THE COURT: That's the ruling.

MR. FALLGATTER: Well, I don't want to be burdened with a misrecollection of what happened. We worked until four o'clock that afternoon on jury instructions.

THE COURT: I can work on jury instructions before nine in the morning and after five in the afternoon so I don't have to have people who are dragged in here off the street minding their own business and want nothing better to do than to come down here to sit here while we're horsing around waiting for witnesses to get here who should have been sitting outside ready to go.

MR. FALLGATTER: And they would have been but for a six o'clock phone call I got from Ms. O'Malley saying they would not stipulate to it. So it's not my fault that he's not here. There's a simple stipulation that would have taken about five minutes to read it. I've stipulated to everything they've asked for. Now I'm being punished because the stipulation they had indicated they would agree to they didn't at six o'clock at night.

MS. O'MALLEY: Your Honor –

THE COURT: Just one second.

MR. FALLGATTER: And then I lost a witness.

MS. O'MALLEY: Your Honor, I have never indicated I would stipulate to that witness.

THE COURT: I'm not getting into an argument between the two of you. The two of you can go argue and talk to each other some place else. If I ever have another case with the two of you, it'll work the same way. You go talk somewhere else. Don't tell me what you've agreed to or what you haven't agreed to because I'm not going to sit here and rule on fights between lawyers.

MR. FALLGATTER: But my point is, Your Honor, I should not have to even call this witness. I've stipulated to all of their officers, and if they would have stipulated to mine –

THE COURT: Don't call the witness then. I told you I would because the witness has come up here from West Palm Beach, that if no one wants to call Detective Smith, I will put Detective Smith on the stand. You don't want to ask questions, I'll ask questions.

MR. FALLGATTER: I'm prepared to call him, Your Honor.

THE COURT: Then let's go. Do we have all the jurors?

COURT SECURITY OFFICER: I'll check, Your Honor.

THE COURT: And you can worry with the other witnesses. Keep your own time so you make sure I'm not cheating you out of thirty seconds.

MR. FALLGATTER: Your Honor, may I further inquire? I only worked until one o'clock last night on my closing argument to tailor it to the Court's

instructions yesterday that I would have an hour. I'm barely at that.

THE COURT: Well, then you don't have to call Mr. Tate, you don't have to call Ms. Brown and you don't have to call Mr. Smith.

MR. FALLGATTER: I shouldn't have to call Mr. Tate. It is one check that they agreed to stipulate to. The government is putting me in this position. I've stipulated to every check of theirs. They told me last week they would stipulate to those checks. Now this morning they won't and you're punishing me because the government decides that perhaps I may have some defenses in this case? That's what's happening here.

THE COURT: That you have defenses?

MR. FALLGATTER: Yes, sir.

THE COURT: Put them all on, but put them on properly.

MR. FALLGATTER: I am putting them on properly.

THE COURT: No, you're not putting them on properly.

MR. FALLGATTER: I'd like to tender to the Court our Exhibit 32B. It's a stipulation that consists of three lines, and if the government had agreed to that, like they said they would, it would take the Court about ten seconds to read this stipulation.

THE COURT: Ms. O'Malley said she didn't agree to stipulation No. 32, so I don't want to look at it.

MR. FALLGATTER: 32A. Well, it's on the record. My point is the Court is punishing me because it is now deciding –

THE COURT: No –

MR. FALLGATTER: – that they don't want to proceed with –

THE COURT: Well, maybe next time what you ought to do is before the first day of trial starts, have all of your stipulations signed and don't worry about it in the middle of the case.

MR. FALLGATTER: The government didn't and I relied on the good faith of the attorneys and officers of the Court, just as they do with me. I've signed every stipulation they've asked me to do, and we've been to sidebar doing it. Now when it's in my case and we're about to rest, the government takes unfair advantage of me and they're using the Court to do that.

They're the ones that are making me call Tate. I shouldn't have had to call him. I tried Ms. O'Malley at four o'clock yesterday. She never returned my phone calls. I hear at five minutes to nine this morning that she will not agree to one check that she agreed to earlier this week. I shouldn't have to call Tate. I should be able to call the agent on the stand very briefly to say, is that a check that was obtained on March 28th, the exact same date you have talked about, and they're saying, no. And why? Because Your Honor is allowing them to do that and you're punishing me for their reneging on agreements they've made to me about putting evidence in. And it isn't fair. This has been a one-week trial. It's complicated issues.

THE COURT: Ms. O'Malley, did you agree to put that check in?

MS. O'MALLEY: No, Your Honor.

THE COURT: That's the end of the matter.

MS. O'MALLEY: If I may just make the record clear, Your Honor.

THE COURT: Yes.

MS. O'MALLEY: The reason I will not stipulate, and I don't disagree with the facts in the stipulation, but I have additional information I need to cross-examine Mr. Tate about if that check comes in.

MR. FALLGATTER: And I would stipulate to that perhaps. Here we are on the record. She doesn't agree with the stipulation; it's an accurate stipulation, and I would be punished for calling Mr. Tate because now she won't agree to a factually accurate stipulation?

THE COURT: I don't care whether the stipulation is accurate, inaccurate. She says she never agreed to stipulate to it. Now let's go on. Just let me know the minute we have all the jurors.

COURT SECURITY OFFICER: They're all here, Your Honor.

THE COURT: Let's go.

MR. FALLGATTER: Your Honor, may I seek clarification? And I hope you'll reconsider this, but assuming –

THE COURT: I'm not going to reconsider it. Listen, Mr. Fallgatter, there is only one way to run a courtroom and that's a correct way, and the

incorrect way is to tell me at one o'clock on Thursday that we've got this one more witness, can we break, when Tate was here at the beginning of the week and you could have called Tate yesterday. You could have called Tate on Wednesday.

MR. FALLGATTER: I would never in my wildest dreams have believed I would have had to call Tate because the government had told me earlier in the week we could stipulate to these checks. I was going to do it through their witness. I never had any imagination that I would ever need Tate back here. I shouldn't have to have him here.

THE COURT: Well, then maybe you didn't think the case through clearly.

MR. FALLGATTER: I thought through it completely, Your Honor.

THE COURT: Get Mr. Smith.

MR. FALLGATTER: Judge, clarification. Reduction from my time you're contemplating, is that my direct examination?

THE COURT: That's your examination.

MR. FALLGATTER: Not the government's?

THE COURT: Your examination of anybody other than Mr. Smith that you call. As far as I'm concerned, there are two witnesses left. One was Mr. Smith and one was her rebuttal witness.

(Jury present.)

[R172-2-11]

Boston's counsel later expressed concern that the Government's objections, which resulted in bench conferences, were also being counted against his case:

> MS. O'MALLEY: Your Honor, I would object to that under 608 as extrinsic evidence of bad acts and we're going into exactly what 608 envisions.
>
> THE COURT: Go ahead.
>
> MR. FALLGATTER: Your Honor, if I seem nervous, I am. Are these sidebars deducted from my time too, Your Honor?
>
> THE COURT: Well, everything is being deducted.
>
> MR. FALLGATTER: But it's her objection.
>
> THE COURT: Go ahead.

[R172-27]

After one of the belated witnesses, Kendell Renee Brown, had testified, the district court excused the jury and questioned the witness:

> THE COURT: Ladies and gentlemen, could you just step into the jury room for one minute, please.
>
> (Jury excused, 9:25 a.m.)
>
> THE COURT: You can be seated. Are you currently employed?
>
> THE WITNESS: Yes.
>
> THE COURT: How long have you worked at the place you've been working at?
>
> THE WITNESS: Since August of last year.
>
> THE COURT: Same address?

THE WITNESS: My home address?

THE COURT: No, business address.

THE WITNESS: Yes.

THE COURT: And home address, how long have you lived where you're living?

THE WITNESS: Since December.

THE COURT: Since December?

THE WITNESS: Yes.

THE COURT: And when was the first time you knew that you might be a witness in this case?

THE WITNESS: Just yesterday.

THE COURT: Who came to find you yesterday?

THE WITNESS: Hum, a guy called me, hum – what was his name – Shawn Mulholland?

THE COURT: Mulholland?

THE WITNESS: Mulholland.

THE COURT: But you've been living in the same place since December?

THE WITNESS: Yes.

THE COURT: Working in the same place since December?

THE WITNESS: Yes.

THE COURT: You weren't out hiding somewhere?

THE WITNESS: No.

THE COURT: Does everyone in this gang that you grew up know where you work and live?

THE WITNESS: Yeah, but the neighborhood we grew up in kind of – we don't stay in that same neighborhood anymore. Everybody kind of spreaded out.

THE COURT: But they know where you are?

THE WITNESS: Yeah.

THE COURT: You kind of socialize still?

THE WITNESS: Yes.

THE COURT: Thank you. You can be excused.

MR. FALLGATTER: Your Honor, do you want to hear when she first saw me?

THE COURT: When she first saw you? No, I'm not interested. I'm just interested was she out hiding that nobody could find her since this case was scheduled to go to trial.

MR. FALLGATTER: Well –

THE COURT: Obviously she has been around.

MR. FALLGATTER: You know, there's about a million people live in Jacksonville, Judge.

THE COURT: One million exactly.

MR. FALLGATTER: Well, it's not easy to find folks when they move and you don't have addresses and phone numbers.

THE COURT: She said she has worked at the same place since August, lived at the same place since December. Maybe you'd better get a better one.

MR. FALLGATTER: I've had three investigators, one who spent thirty years with the United States as a Special Agent and two trained investigators looking for her, Judge. I mean, people can't find witnesses, and I please hope the Court won't hold that against me. I've had three investigators for three weeks trying to find her.

THE COURT: That's why I said you're losing time. Go ahead. Thank you.

(Witness excused.)

THE COURT: Bring the jury back. Do you have another witness now? The same ruling with respect to this next witness if you're going to call somebody.

MR. FALLGATTER: Does the Court have –

THE COURT: Yes, you've lost eleven minutes.

[R172-34-38]

Counsel for Boston rushed through four witnesses then rested:

MR. FALLGATTER: Judge, two things. I would like to note it's 9:34, and I'm only four minutes late from 9:30 that we talked about –

THE COURT: Well, you've used fourteen minutes.

MR. FALLGATTER: Well, Your Honor, I'm only four minutes over the time we talked about, so if you might –

THE COURT: You have 46 minutes.

[R172-43].

ARGUMENTS IN SUPPORT OF GRANTING THE WRIT

I. DAVID BOSTON WAS DENIED A FAIR TRIAL BY THE TRIAL COURT'S PROHIBITION ON CLOSING ARGUMENT CONCERNING THE FACT THAT COCONSPIRATOR GLENDA BOSTON HAD NOT TESTIFIED AND BY THE TRIAL COURT'S INSTRUCTION TO THE JURY THAT SUCH ARGUMENT WAS TO BE DISREGARDED AS COMPLETELY IMPROPER.

During closing argument the Government objected as soon as counsel for Boston simply stated that coconspirator Glenda Boston had not testified. Glenda Boston was an indicted coconspirator and ex-wife of Petitioner David Boston, who had pled guilty prior to David Boston's trial pursuant to a written plea bargain with the Government. The trial court, over objection by the defense, prohibited any further argument concerning Glenda Boston and instructed the jury to disregard defense counsel's argument about Glenda Boston because it was completely improper. This instruction was not only wrong, and not only impermissibly hampered the defense of the charges, but it communicated to the jury the trial judge's opinion about the case.

The trial court erred. The attempted argument was completely proper. Indeed, David Boston was entitled to an instruction that the jury could draw an adverse inference from the Government's failure to call Glenda Boston as a Government witness.

Based on the jury's verdict acquitting David Boston of the substantive counterfeit check counts involving two other alleged coconspirators, it is obvious that argument concerning alleged coconspirator Glenda Boston was

essential to the defense. The jury convicted David Boston only on the conspiracy count and only after notifying the court that they were hopelessly deadlocked and received an *Allen* charge. In this close case this preserved error entitled David Boston to a new trial.

This Court should grant certiorari to address the issue of the permissibility of closing argument of defense counsel in a criminal case with respect to uncalled witnesses, when the witness is *de facto* under the control of the Government by virtue of having entered into a plea agreement with the Government before trial. Boston argues that it denied him Due Process and a fair trial as guaranteed by the Sixth Amendment to restrict his closing argument in this manner.

II. DAVID BOSTON WAS DENIED A FAIR TRIAL BY THE TRIAL COURT'S *SUA SPONTE* AND ARBITRARY RESTRICTION ON THE PRESENTATION OF THE DEFENSE CASE, TELLING DEFENSE COUNSEL TO NOT CALL ANY FURTHER WITNESSES, AND IF HE DID SO, HIS CLOSING ARGUMENT, WHICH ALREADY HAD BEEN ARBITRARILY REDUCED BY ONE-THIRD, WOULD BE FURTHER REDUCED MINUTE PER MINUTE FOR EACH ADDITIONAL MINUTE A DEFENSE WITNESS WAS ON THE WITNESS STAND.

A review of the record discloses a trial judge who was inexplicably at odds[2] with defense counsel throughout the

[2] Both the trial judge and the defense counsel had formerly been managing assistant United States Attorney for this division of the United States District Court for the Middle District of Florida.

trial, culminating in a *sua sponte* and totally arbitrary order that the defense not put on further defense witnesses – crucial fact witnesses who had been listed in advance of trial in the defense witness list – or if it did so its closing argument, which had already been reduced by the court by one third, would be reduced minute per minute that further defense witnesses were on the witness stand.

This arbitrary and unreasonable limit on the defendant's right to present his defense caused defense counsel to race through his remaining witnesses and lose precious time from an already starkly truncated closing argument. By so doing the trial court denied David Boston his right to a fair trial.

The trial court erred; the error was preserved; the Government cannot meet its burden in this close case of showing that the trial court's error did not affect the outcome of the trial.

This Court should grant certiorari in this case to address the standard for limitations on the presentation of the defense case in a criminal trial, be that in the presentation of witnesses or the limitation of closing argument. Trial judges are rightfully concerned about proper control of the course of trial, but a criminal defendant's Sixth Amendment right to trial by jury and Fifth Amendment right to Due Process of law cannot be arbitrarily impaired by a trial judge's personal pique or unreasonable demands.

CONCLUSION

WHEREFORE, the Petitioner, DAVID BOSTON, respectfully requests this Honorable Court grant this petition for certiorari.

Respectfully submitted,

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[DO NOT PUBLISH]

2006 WL 2597782

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 05-16598
Non-Argument Calendar

D. C. Docket No. 04-00083-CR-J-20-HTS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DAVID BOSTON,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

(Filed September 12, 2006)

Before DUBINA, MARCUS and WILSON, Circuit Judges.

PER CURIAM:

Appellant David Boston ("Boston") appeals his conviction after a jury found him guilty of conspiring to pass and utter counterfeit checks in violation of 18 U.S.C. §§ 371, 514. His co-conspirator, Glenda Boston ("Glenda") pled guilty to the conspiracy charge. On appeal, Boston first contends that he should have been able to comment on

Glenda's failure to testify for the government, and the district court should not have told the jury to disregard his comment regarding her failure to testify, but rather, should have given a missing witness instruction, allowing the jury to infer that her testimony would have been unfavorable to the government. Boston also challenges the district court's reduction in his time for closing argument and contends that he was denied his Fifth Amendment right to a fair trial when the district court reduced his attorney's time for closing argument for each extra witness he presented. He also argues that the district court's alleged bias against him deprived him of a fair trial. We address each argument in turn.

I.

We review "jury instructions *de novo* to determine whether they misstate the law or mislead the jury to the prejudice of the objecting party" and "[s]o long as the instructions accurately reflect the law, the trial judge is given wide discretion as to the style and wording employed in the instructions." *United States v. Zlatogur,* 271 F.3d 1025, 1029 (11th Cir. 2001) (citation omitted). We review "a district court's refusal to give a jury instruction requested by the defense for abuse of discretion." *United States v. Dulcio,* 441 F.3d 1269, 1275 (11th Cir. 2006). For the denial of a requested jury instruction to be reversible error a defendant must show that the instruction: "(1) was a correct statement of the law; (2) was not adequately covered in the instructions given to the jury; (3) concerned an issue so substantive that its omission impaired the accused's ability to present a defense; and (4) dealt with an issue properly before the jury." *Id.* (citation omitted).

"[I]f a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable." *Graves v. United States,* 150 U.S. 118, 121, 14 S. Ct. 40, 41 (1893). "When a witness is peculiarly within the control of one party, and that witness' testimony would elucidate facts in issue, an instruction is appropriate regarding the permissible inference which the jury may draw from the party's failure to call the witness." *United States v. Nahoom,* 791 F.2d 841, 846 (11th Cir. 1986). However, to receive a "missing witness instruction," the requesting party must demonstrate: "the potential witness' unavailability in a physical or practical sense; and . . . [that] the potential testimony [would be] relevant and noncumulative." *Jones v. Otis Elevator Co.,* 861 F.2d 655, 659 (11th Cir. 1988). An inference from a party's failure to call a witness equally available to both parties is impermissible. *United States v. Chapman,* 435 F.2d 1245, 1247 (5th Cir. 1971). A party who may or may not invoke the Fifth Amendment is equally available to either party. *Id.* at 1247-48.

A witness's unavailability is not determined solely from physical presence or accessibility to subpoena, but rather, will turn on the witness's relationship to the nonproducing party. *Jones,* 861 F.2d at 659. A witness is unavailable in the practical sense when the relationship is such that it creates a bias or hostility against the opposing party. *Id.* at 659-60 (noting that because of employee's economic interests, employer-employee relationship created practical unavailability).

The district court is not required to give the missing witness instruction to the jury if the witness would testify

against the interests of the defendant. *United States v. Link,* 921 F.2d 1523, 1529 (11th Cir. 1991).

We conclude from the record that Boston did not meet his burden of showing that the missing witness instruction should have been given. First, he did not show how Glenda was "peculiarly within the control" of the government and unavailable to him. Notably, Glenda's plea agreement did not contain a cooperation agreement, so there was no indication that she was helping the government with its case against Boston such that the relationship between her and the government – the nonproducing party – would create bias or hostility against him. *See Jones,* 861 F.2d at 659. That Glenda pled guilty, alone, does not indicate that she was "peculiarly" within control of the government as she still retained her Fifth Amendment privilege. *See United States v. Kuku,* 129 F.3d 1435, 1437-38 (11th Cir. 1997) (codefendant who had entered guilty plea but had not yet been sentenced could properly invoke his Fifth Amendment privilege against self-incrimination at defendant's trial).

Further, nothing in the record indicates that Boston made any attempt to locate and subpoena Glenda or call her as a witness. Indeed, she was not on any of his witness lists, and he never indicated during trial that he intended to call her. It is further not known whether Glenda would have invoked her Fifth Amendment privilege if called, and thus, she was equally available to both Boston and the government. *See Chapman,* 435 F.2d at 1247-48.

We also conclude from the record that Boston failed to meet his burden of showing that the missing witness instruction should have been given because he did not show how Glenda's testimony would have been favorable

to him. Indeed, testimony at trial indicated that Glenda's testimony, if any, would likely be unfavorable to Boston, as certain witnesses testified that they saw her make checks and received checks from her. Further, in her plea agreement, she identified Boston as one of her co-conspirators. As Glenda would likely have testified against the interests of Boston, the district court was not required to give the missing witness instruction to the jury. *See Link,* 921 F.2d at 1529; *see also United States v. Perez-Tosta,* 36 F.3d 1552, 1556 n.2 (11th Cir. 1994) (district court did not err in failing to give missing witness instruction for government's failure to call only agent with direct view of defendant's house because other testimony at trial indicated that his testimony would likely be unfavorable to defendant).

Thus, since Boston did not establish the requisite predicate for the missing witness instruction, the district court did not err in telling the jury to disregard Boston's comment and its instructions did not misstate the law. Since the missing witness inference was not properly before the jury, we conclude that the district court did not abuse its discretion in denying Boston's requested instruction. *See Dulcio,* 441 F.3d at 1275.

II.

While the district court "has an obligation to insure a fair trial," *see United States v. Thayer,* 204 F.3d 1352, 1355 (11th Cir. 2000), it also "has broad discretion in the management of the trial," and we will not reverse on the court's management rulings "absent a clear showing of abuse." *United States v. Hilliard,* 752 F.2d 578, 582 (11th Cir. 1985). In this respect, a district court's instructions to

counsel concerning closing arguments "will be reversed only if counsel is prevented from making all legal arguments supported by the facts." *United States v. Hall,* 77 F.3d 398, 400 (11th Cir. 1996). Furthermore, the period of time to be allotted for a defendant's closing argument is within the sound discretion of the district court. *United States v. Carter,* 760 F.2d 1568, 1581 (11th Cir. 1985). If a closing argument is unreasonably curtailed, reversal may be warranted. *United States v. Bernes,* 602 F.2d 716, 722 (5th Cir. 1979). A defendant, however, has a duty to exercise due diligence in procuring the attendance of witnesses. *See United States v. Darby,* 744 F.2d 1508, 1522 (11th Cir. 1984) (in the context of requesting a continuance).

Under the Fifth Amendment, a criminal defendant is only entitled to a fair trial, not a perfect one. U.S. Const. amend. V; *United States v. Ramirez,* 426 F.3d 1344, 1353 (11th Cir. 2005).[1] To amount to reversible error on the basis of bias, a judge's remarks must demonstrate such pervasive bias and unfairness that they prejudice one of the parties in the case. *United States v. Ramirez-Chilel,* 289 F.3d 744, 750 n.6 (11th Cir. 2002).

Here, we conclude from the record that the district court did not abuse its discretion in limiting Boston's time for closing argument. Indeed, it is clear from the record that Boston did not exercise due diligence in securing the attendance of witnesses Detective Smith or

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[1] It is noted that Boston did not raise a constitutional challenge below. However, under either a *de novo* or plain error standard of review, Boston's claim fails as the district court did not abuse its discretion in limiting Boston's time for closing argument or otherwise demonstrate bias against him.

Kendell Brown. The court, based on indications from Boston on Wednesday, had informed the jury that the trial would be done by Thursday or Friday at the latest. However, on Thursday, Boston had only one witness ready to testify, and had not secured Smith's presence. In fact, Boston had served Smith with the subpoena only the day before he was supposed to testify, knowing he had to travel from West Palm Beach to Jacksonville. Boston also indicated that he would not call Brown, but did call her unexpectedly on Friday morning and, as explanation, said that he had been unable to locate her, even though she had lived and worked at the same places for several months and her acquaintances knew this. She also indicated that she had been contacted about being a witness in the case only the day before. Boston told the court that he had looked for Brown for three weeks, but he knew since November 2004 that the case was going to trial and Brown had been on all of his witness lists. He also never previously indicated to the court any problems in securing Brown's presence. Given Boston's lack of diligence in procuring witnesses, it cannot be said that the district court's reducing his time for closing argument by only 14 minutes, or approximately 25 percent, was an abuse of discretion. *See Bernes,* 602 F.2d at 722; *Hodge v. United States,* 271 F.2d 52 (5th Cir. 1959)[2] (party's request for 40 minutes for closing argument and district court's allowance of 30 minutes was not an abuse of discretion).

Furthermore, Boston was not prevented, during his closing argument, from making all legal arguments

[2] In *Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), we adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to October 1, 1981.

supported by the facts. He addressed the conspiracy count and brought out areas of doubt based on the evidence produced at trial and the witnesses' credibility. Neither below nor on appeal does he point to any specific legal arguments that he was not allowed to make. *Hall,* 77 F.3d at 400; *see also United States v. Gray,* 105 F.3d 956, 965 (5th Cir. 1997) (where appellant pointed to no precise information that he was unable to provide the jury because of the court's limitation on closing argument, he failed to show that the district court abused its discretion) (persuasive authority).

The record as a whole also does not demonstrate that the district court was partial or unconstitutionally deprived Boston of a fair trial. The record demonstrates that the district court was generally patient with Boston's failure to produce witnesses and made other arrangements when necessary. The district court offered to issue warrants for absent witnesses under subpoena, tried to find a flight for Smith, allowed both parties the opportunity to contact him, allowed the trial to go on longer than anticipated based on Boston's problems in securing Smith, and allowed Boston to present the testimony of unexpected witnesses. Any comments by the district court expressing displeasure, impatience or annoyance with Boston were made outside the presence of the jury, and thus, did not prejudice him. In sum, we hold that the district court did not abuse its discretion in limiting Boston's time for closing argument, did not demonstrate bias towards Boston, and did not otherwise deprive him of a fair trial. Accordingly, we affirm Boston's conviction.

AFFIRMED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

JUDGMENT IN A CRIMINAL CASE

CASE NO. 3:04-cr-83(S2)-J-20HTS

UNITED STATES OF AMERICA

USM Number: 30666-018

v.

Defendant's Attorney:
Curtis S. Fallgatter, Esq. (ret)

DAVID BOSTON

(Filed Nov. 25, 2005)

THE DEFENDANT:

__ pleaded guilty to Count.

__ pleaded nolo contendere to Count which was accepted by the court.

X was found guilty on Count One of the Second Superseding Indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. 371	Conspiracy to manufacture and pass false and fictitious corporate checks.	April 2003	One

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984 as modified by *United States v. Booker*.

X The defendant has been found not guilty on Counts Two and Three of the Second Superseding Indictment.

__ Count(s) (is)(are) dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the Court and United States Attorney of material changes in economic circumstances.

Date of Imposition of Judgment:
November 22, 2005

/s/ Harvey E. Schlesinger
HARVEY E. SCHLESINGER
UNITED STATES DISTRICT JUDGE

DATE: November 23, 2005

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **27 months**.

__ The court makes the following recommendations to the Bureau of Prisons:

__ The defendant is remanded to the custody of the United States Marshal.

__ The defendant shall surrender to the United States Marshal for this district.

__ at _____ a.m./p.m. on _____.

__ as notified by the United States Marshal.

X The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

X before 2 p.m. on **Tuesday, January 3, 2006**.

__ as notified by the United States Marshal.

__ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **three (3) years**.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the Court.

_X_ The above drug testing condition is suspended, based on the Court's determination that the defendant poses a low risk of future substance abuse.

_X_ The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

_X_ The defendant shall cooperate in the collection of DNA as direction by the probation officer.

___ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer.

___ The defendant shall participate in an approved program for domestic violence.

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the Court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and

shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

ADDITIONAL SUPERVISED RELEASE TERMS

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall also comply with the following special conditions of supervised release:

__ The defendant shall participate in the Home Detention program for a period of ___. During this time, defendant will remain at defendant's place of residence except for employment and other activities approved in advance by the defendant's Probation Officer. Defendant will be subject to the standard conditions of Home Detention adopted for use in the Middle District of Florida, which may include the requirement to

wear an electronic monitoring device and to follow electronic monitoring procedures specified by the Probation Officer. Further, the defendant shall be required to contribute to the costs of services for such monitoring not to exceed an amount determined reasonable by the Probation Officer based on ability to pay (or availability of third party payment) and in conformance with the Probation Office's Sliding Scale for Electronic Monitoring Services.

__ The defendant shall participate as directed in an in-patient or out-patient program approved by the Probation Officer for treatment of narcotic addiction or drug or alcohol dependency which will include testing for the detection of substance use or abuse. Further, the defendant shall be required to contribute to the costs of services for such treatment not to exceed an amount determined reasonable by the Probation Officer based on ability to pay or availability of third party payment and in conformance with the Probation Office's Sliding Scale for Substance Abuse Treatment Services.

__ The defendant shall participate as directed in a program of mental health treatment approved by the Probation Officer. Further, the defendant shall be required to contribute to the costs of services for such treatment not to exceed an amount determined reasonable to by Probation Officer based on ability to pay or availability of third party payment and in conformance with the Probation Office's Sliding Scale for Mental Health Treatment Services.

__ If deported by the Bureau of Immigration and Customs Enforcement (BICE), the Defendant shall not reenter the United States unless allowed to do so legally.

__ Defendant shall provide the Probation Officer access to any requested financial information.

__ Defendant shall be prohibited from incurring new credit charges, opening additional lines of credit, or obligating for any major purchases without approval of the Probation Officer.

__ Defendant shall perform ___ hours of community service as directed by the Probation Officer.

__ Defendant shall submit to a search of his/her person, residence, place of business, or vehicle conducted by the Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release; failure to submit to a search may be grounds for revocation; defendant shall inform any other residents that the premises may be subject to a search pursuant to this condition.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	**$100.00**		

__ The determination of restitution is deferred until ___. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

__ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment,

unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. Section 3664(I), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
TOTALS	$	$	

__ Restitution amount ordered pursuant to plea agreement: $

__ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the 15th day after the date of judgment, pursuant to 18 U.S.C. Section 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. Section 3612(g).

__ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

__ the interest requirement is waived for the __ fine __ restitution.

__ the interest requirement for the __ fine __ restitution is modified as follows:

---

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A X Lump sum payment of $100.00 due immediately, balance due

__ not later than, or
__ in accordance __ C, __ D, __ E, or __ F below, or

B __ Payment to begin immediately (may be combined with __ C, __ D, or __ F below); or

C __ Payment in equal (e.g., weekly, monthly, quarterly) installments of $ over a period of (e.g., months or years), to commence (e.g., 30 or 60 days) after the date of this judgment; or

D __ Payment in equal (e.g., weekly, monthly, quarterly) installments of $ over a period of (e.g., months or years), to commence (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E __ Payment during the term of supervised release will commence within (e.g., 30 or 60 days) after release from imprisonment. The Court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F __ Special instructions regarding the payment of criminal monetary penalties:

The defendant is ordered to begin making payments of ___ per month and this payment schedule shall continue until such time as the court is notified by the defendant, the victim or the government that there has been a material change in the defendant's ability to pay.

Unless the Court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

__ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

__ The defendant shall pay the cost of prosecution.

__ The defendant shall pay the following court cost(s):

__ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.